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No. 585

In the Supreme Court of the United States

OCTOBER TERM, 1970

COOPER AGENCY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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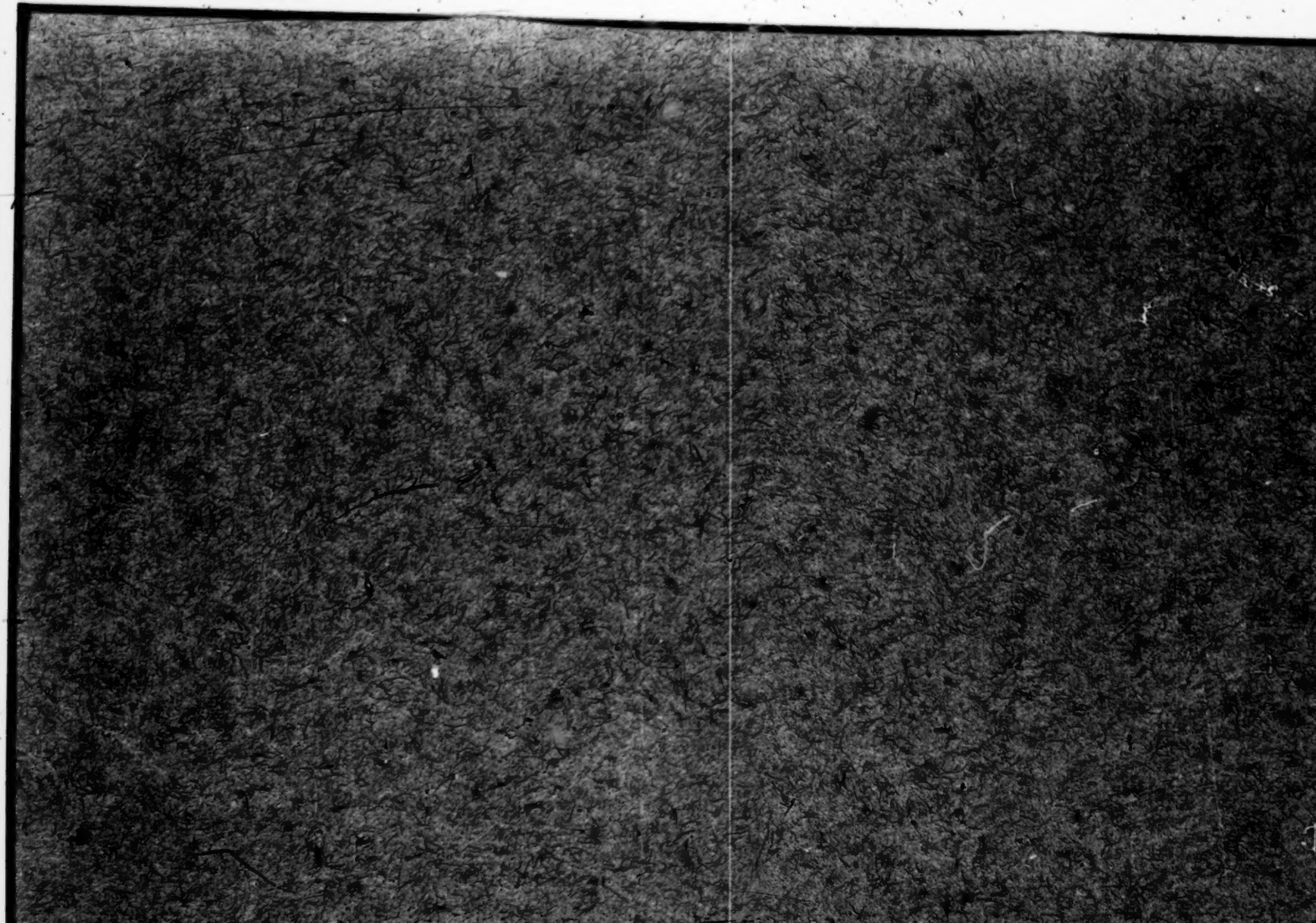

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OPINIONS BELOW

The opinion and order of the district court (Pet. App. 13–25) are reported at 301 F. Supp. 871. The opinion of the court of appeals (Pet. App. 11) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1970 (Pet. App. 12). A petition for reconsideration was denied on May 28, 1970 (*ibid.*). The petition for a writ of certiorari was filed on August 24, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

404-840—70

QUESTION PRESENTED

Whether this suit for refund of income taxes paid pursuant to a compromise tax settlement agreement is barred by the express provision of that agreement precluding claims or suits for refund of the taxes paid in settlement.

STATUTE INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 7122. COMPROMISES.

(a) *Authorization.*—The Secretary or his delegate may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General or his delegate may compromise any such case after reference to the Department of Justice for prosecution or defense.

STATEMENT

In prior litigation, petitioner and a group of related taxpayers (the "Cooper Group") unsuccessfully sought injunctive relief against certain assessments made by the Commmissioner on the ground that the notices of deficiency on which they were based were defective. *Cooper Agency, Inc.* v. *McLeod*, 235 F. Supp. 276, 283 (E.D. S.C.), affirmed *per curiam*, 348 F. 2d 919 (C.A. 4). Following that litigation, petitioner, on its own behalf and as representative of the Cooper Group, commmenced negotiations for settlement of the assessed deficiencies and other

proposed deficiencies. On November 24, 1965, petitioner, represented by four able and experienced counsel, submitted a written offer of $1,250,000 in compromise settlement of all tax assesments made or proposed against petitioner and the Cooper Group for all taxable years through 1961. The offer provided that "No claims or suits for refund will be made for the years involved in the settlement." (Pet. App. 11, 14–15.)

The compromise offer, including the no refund provision, was accepted by the government, and petitioner and the Cooper Group paid the stipulated sum. Pursuant to the agreement, petitioner, again acting for all the taxpayers involved, proposed that $1,192,405.43 be "allocated to cover full payment of any transferee liability claims against [petitioner]" and that the remaining $57,594.57 "be allocated to the complete settlement of all tax deficiencies * * * and all transferee liabilities of all those named in the agreement except any amounts owed by [petitioner] as transferee." As of November 24, 1965, the net outstanding assessments against petitioner, with interest and penalties, totalled $1,795,466.63, and the outstanding assessments against the other parties involved were in excess of $15,000,000. The proposed allocation was accepted by the government as submitted. (Pet. App. 16–17.)

Exactly two years after the settlement agreement, petitioner filed a refund claim for the portion of the settlement payment allocated to the claims against it, on the basis that it was "not liable for any amount

as a transferee of property from any taxpayer at any time" (Pet. App. 17). The claim was rejected and petitioner brought this suit in the district court. The court sustained disallowance of the claim, holding that it was expressly prohibited by the terms of the compromise agreement, and that petitioner was estopped from bringing the action because of the government's reliance on the agreement (Pet. App. 13–25). The court of appeals affirmed (Pet. App. 11).

ARGUMENT

The decision below is correct. There is no conflict or other reason for further review.

1. A compromise agreement executed pursuant to Section 7122 of the Internal Revenue Code of 1954, *supra*, p. 2, is a contractual agreement, governed by the rules applicable to contracts generally, its terms to be enforced as expressed unless contrary to public policy. *United States* v. *Lane*, 303 F. 2d 1 (C.A. 5); *Jones* v. *First Nat. Bldg. Corp.* 155 F. 2d 815 (C.A. 10). The compromise agreement entered into by petitioner and the government specifically provides that no claims or suits for refund would be made for the years involved in the settlement. Such a condition is standard in tax settlement agreements and has been uniformly upheld and enforced by the courts in accord with the public policy in favor of settling tax cases. See, *e.g.*, *Monge* v. *Smyth*, 229 F. 2d 361 (C.A. 9), certiorari denied, 351 U.S. 976; *Hamilton* v. *United States*, 324 F. 2d 960 (Ct. Cl.). Petitioner's express covenant not to claim or to sue for a refund precludes it from bringing this suit.

2. There is no merit to petitioner's contention (Pet. 6–7) that the taxes it paid to the government under the agreement were wrongfully and unconstitutionally exacted from it. At all events, the subject of the validity of the assessments was fully litigated in the earlier proceeding and may not now be relitigated. Moreover, petitioner's compromise agreement and payment were made with the assistance of counsel and without duress. Petitioner did not promptly disaffirm the agreement after it was made, but rather waited to assert its refund claim until the government could not be restored to its former position because of the bar of the limitations statute. Petitioner is therefore estopped from making its refund claim. See *Girard* v. *Gill*, 142 F. Supp. 770 (M.D. N.C.), affirmed, 243 F. 2d 166 (C.A. 4).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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